STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED September 16, 2014
v JOSE JUNIOR GUTIERREZ, Defendant-Appellant.	No. 315057 Bay Circuit Court LC No. 12-010303-FH

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	
v MICHAEL GEORGE CORPUZ, III, Defendant-Appellant.	No. 315059 Bay Circuit Court LC No. 12-010301-FH

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	
v VICTOR ANTHONY CORPUZ, Defendant-Appellant.	No. 315068 Bay Circuit Court LC No. 12-010302-FH

Before: FITZGERALD, P.J., and GLEICHER and RONAYNE KRAUSE, JJ.

PER CURIAM.

Following a joint trial before a single jury with the representation of a shared attorney, defendants Jose Gutierrez, Michael Corpuz III (Michael), and Victor Corpuz (Victor) were each convicted of unarmed robbery, MCL 750.530, assault with intent to do great bodily harm less

than murder, MCL 750.84, and possession of marijuana, MCL 333.7403(2)(d). Defendants now contend that they were prejudiced by the joint representation because they were unable to shift the blame onto their cohorts or to minimalize their roles in the offense. Gutierrez and Victor also raise additional challenges to their counsel's performance at trial. Gutierrez and Michael challenge the sufficiency of the evidence supporting their unarmed robbery convictions. Finally, all three defendants believe several errors affected their sentencing.

The vast majority of defendants' challenges either lack merit or amount to harmless error. As the trial court erred in scoring various sentencing variables and then relied on Victor's high overall offense variable score in imposing upwardly departing sentences, however, we must vacate his sentences and remand for resentencing. We otherwise affirm.

I. BACKGROUND

On the evening of April 3, 2012, defendants met the victim, Dustin Hnilica, at a bar in Bay City. Hnilica manufactured his own soap and approached defendants inside the bar to give them samples. During their discussions, Hnilica informed defendants that he was a licensed medical marijuana user and the group discussed the various properties and qualities of marijuana grown in different states. At closing time in the early morning hours of April 4, Hnilica, defendants, and Lisa Veldman, another new acquaintance, went into the parking lot together to smoke cigarettes and continue their conversation.

Hnilica entered his vehicle, readying to leave. He testified that Gutierrez approached and told him that Victor wanted to speak with him. Victor entered and sat in the passenger-side front seat. Victor asked Hnilica if he was a police officer. Hnilica indicated that he was not and showed Victor his identification upon request. Hnilica claimed that he became nervous and ordered Victor to get out of the car, but Victor refused. Hnilica then noticed that Michael was approaching the car. Hnilica tried to start his car so he could flee, but Victor fought him for the keys, punching him in the face and head. Hnilica was able to insert his key in the ignition and start it. He placed the car in reverse while trying to force out Victor. Hnilica then put the car in drive, crashed through a fence, and collided with a tree. He and Victor continued to struggle, with Victor punching Hnilica and Hnilica biting Victor.

Hnilica hit his head when his car struck the tree and he was unable to see or remember everything that happened next. Someone dragged Hnilica from his car. Multiple feet kicked and fists punched Hnilica repeatedly. He heard all three defendants egging each other on and discussing whether to kill him. Suddenly, the assailants were gone and Hnilica fled to look for help. He suffered severe injuries as a result of this attack.

Veldman and the bartender contacted authorities when the altercation began, but they did not arrive in time to stop the assault. Veldman described the vehicle in which defendants were travelling and indicated the direction in which they left the scene. The police soon encountered defendants' vehicle, stopped it, and arrested its occupants. Each defendant had noticeable blood stains on their clothing and shoes. DNA testing confirmed that the blood matched Hnilica's DNA profile. Inside the vehicle, police found Hnilica's jacket, which had been taken during the altercation, as well as two labeled baggies of marijuana, which Hnilica identified as belonging to him.

All three defendants testified at trial and denied assaulting or robbing Hnilica. They claimed that Hnilica invited Victor inside his car and offered to sell him marijuana. Victor claimed that Hnilica "flipped out" when Victor asked him if he was a police officer, and Hnilica then instigated the physical altercation. Victor admitted striking Hnilica, but claimed self-defense. According to Victor, Hnilica's substantial injuries to his head and face occurred when he collided with the fence and tree. He also accused Hnilica of striking Gutierrez with his car. Defendants claimed they pulled Hnilica from the car in order to help him, but Hnilica continued to be combative. Defendants testified that they were eventually able to calm him down and then left. Gutierrez testified that as they were leaving, he mistakenly picked up Hnilica's jacket, believing it belonged to Michael.

The jury disbelieved defendants' story and convicted them of the charged offenses.

II. JOINT REPRESENTATION

All three defendants were jointly represented by the same retained attorney. They now argue that counsel's joint representation created a conflict of interest that prevented counsel from effectively representing all three of them. Specifically, defendants argue that they were prevented from raising incompatible defenses.

MCR 6.005(F) provides that the trial court must advise codefendants of the hazards of employing joint counsel. The rule provides:

> Whenever two or more defendants who have been jointly charged or whose cases have been joined are represented by the same retained lawyer or lawyers associated in the practice of law, the court must inquire into the potential for a conflict of interest that might jeopardize the right of each defendant to the undivided loyalty of the lawyer. The court may not permit the joint representation unless:
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> (1) the lawyer or lawyers state on the record the reasons for believing that joint representation in all probability will not cause a conflict of interests;
>
> (2) the defendants state on the record after the court's inquiry and the lawyer's statement, that they desire to proceed with the same lawyer; and
>
> (3) the court finds on the record that joint representation in all probability will not cause a conflict of interest and states its reasons for the finding.

If counsel subsequently discovers a conflict of interest in the joint representation, he must immediately notify the court. The court must also sua sponte "inquire into any potential conflict that becomes apparent, and take such action as the interests of justice require." MCR 6.005(G).

Approximately six weeks prior to trial, the trial court sua sponte raised the issue of defendants' joint representation. The court questioned at length defense counsel and all three defendants to determine whether there was a probability of a conflict of interest, whether defendants understood the potential for a conflict of interest, and whether defendants were knowingly and voluntarily consenting to joint representation. In this vein, the court advised

defendants that their attorney would be duty-bound to protect the interests of their codefendants and therefore could not present a defense that implicated the others. The court offered to appoint independent counsel for any defendant. The court even ensured that all three defendants understood the plea deals that had been presented to them and the potential conflict of interest created by those deals. Each defendant affirmatively responded that he understood the trial court's advice. All three defendants acknowledged understanding the conflict of interest issue and agreed to the joint representation. In relation to the plea deal issue, Victor specifically stated that he would take no position that required him to "testify against [his] family."

At this hearing, the court considered defense counsel's indication that he "consulted with the State Bar" and determined that, given the defenses the defendants intended to present, it would be permissible to jointly represent all three defendants, but that the joint representation would have to cease if a conflict of interest arose in the future. Counsel also stated that he had explained this to defendants, who stated that they understood and agreed to the joint representation. Counsel continued, "I don't see where anyone is going to be inclined to testify against the others to, you know, to further their own interest, because frankly, they're all on the same page and they've all been consistent in what happened and it does not involve any one of 'em falling on the sword, so to speak. . . ." Each defendant agreed with defense counsel's statements, and each stated that he was waiving his right to claim a conflict of interest.

Defendants correctly assert that the trial court did not specifically find "on the record that joint representation in all probability will not cause a conflict of interest and state[] its reasons for the finding" as required by MCR 6.005(F)(3). However, "[t]he failure to follow this court rule, in itself, does not constitute reversible error." *People v Lafay*, 182 Mich App 528, 531; 452 NW2d 852 (1990). Rather, a defendant must establish that he received ineffective assistance of counsel, i.e., "[h]e must show that an actual conflict of interest existed and adversely affected the adequacy of his representation." *Id*. at 530; see also *People v Kirk*, 119 Mich App 599, 603-604; 326 NW2d 145 (1982) (absent a showing of an actual conflict of interest, reversal is not required where a trial court fails to comply with GCR 1973, 785.4[4], the predecessor to MCR 6.005[F]).

On appeal, defendants claim that an actual conflict of interest rendered counsel's performance constitutionally deficient. Defendants preserved this challenge by raising it below in their motions for a new trial. "A claim of ineffective assistance of counsel presents a mixed question of law and fact. This Court reviews a trial court's findings of fact, if any, for clear error, and reviews de novo the ultimate constitutional issue arising from an ineffective assistance of counsel claim." *People v Brown*, 294 Mich App 377, 387; 811 NW2d 531 (2011) (citations omitted). We review for an abuse of discretion the trial court's decision whether to grant a new trial. *People v Kevorkian*, 248 Mich App 373, 410; 639 NW2d 291 (2001).

Regarding the issue of ineffective assistance of counsel, "'the right to counsel is the right to the effective assistance of counsel.'" *United States v Cronic*, 466 US 648, 654; 104 S Ct 2039; 80 L Ed 2d 657 (1984), quoting *McMann v Richardson*, 397 US 759, 771 n 14; 90 S Ct 1441; 25 L Ed 2d 763 (1970). Generally, a defendant's claim of ineffective assistance includes two components: "First, the defendant must show that counsel's performance was deficient. . . . Second, the defendant must show that the deficient performance prejudiced the defense." *Strickland v Washington*, 466 US 668, 687; 104 S Ct 2052; 80 L Ed 2d 674 (1984). The defendant must overcome the strong presumptions that his "counsel's conduct [fell] within the

wide range of reasonable professional assistance," and that counsel's actions were sound trial strategy. *Id*. at 689.

When a conflict of interest is raised, however, this Court employs a less stringent standard. In such cases, "prejudice is presumed only if the defendant demonstrates that counsel actively represented conflicting interests and that an actual conflict of interest adversely affected his lawyer's performance." *People v Smith*, 456 Mich 543, 556-557; 581 NW2d 654 (1998) (quotation marks and citations omitted). "Such a conflict is never presumed or implied"; the defendant must establish its existence. *Lafay*, 182 Mich App at 530. "[M]ultiple representation does not violate the Sixth Amendment unless it gives rise to a conflict of interest," and this is the defendant's burden to establish. *Cuyler v Sullivan*, 446 US 335, 348; 100 S Ct 1708; 64 L Ed 2d 333 (1980). "To warrant reversal, the prejudice shown must be actual, not merely speculative." *People v Fowlkes*, 130 Mich App 828, 836; 345 NW2d 629 (1983).

At their core, defendants' arguments are essentially the same: they each argue that but for counsel's joint representation, they could have more easily distanced themselves from the assault or the theft. The conflict arose, they contend, because counsel had to promote a unified defense focused simply on discrediting Hnilica. Gutierrez and Michael argue that they would have fared better at trial if they could have shifted the blame for the assault solely onto Victor who was inside the car with Hnilica. Victor asserts that he and Michael would have been able to distance themselves from the robbery of Hnilica's jacket and marijuana as Gutierrez was the individual who physically took the property. Proceeding with joint counsel, defendants contend that they were forced to "sink or swim" together.

The record evidence supported, however, that all three defendants took part in the offenses and, even if they tried to shift the blame onto their cohorts, could have been convicted under an aiding and abetting theory. Hnilica's testimony, which was corroborated by Veldman, supported that all three defendants were acting together, were directly involved in the assault, and shared a common intent to rob Hnilica of his property. It was immaterial who actually initiated the assault, who actually inflicted the injuries, or who actually took the property given this common plan. "Under Michigan law, a defendant who intends to aid, abet, counsel, or procure the commission of a crime, is liable for that crime as well as the natural and probable consequences of that crime." *People v Robinson*, 475 Mich 1, 3; 715 NW2d 44 (2006). The evidence presented by the prosecutor, if believed, showed that all three defendants intended to strike Hnilica or kick him in order to cause great bodily harm to him and to take his money, marijuana and other property after the assault. It follows that, even if only one of the defendants committed a specific act, all three intended to aid in that act and the natural consequences of it. There is no reasonable likelihood that separate trial counsel would have provided Gutierrez and Michael with any benefit by arguing that Victor started the fight where the testimony indicated that Gutierrez and Michael joined in the attack. Similarly, the fact that Gutierrez admitted taking the jacket would not have prevented the jury from finding that Victor and Michael were also criminally liable for robbery if the jury found that they shared Gutierrez's larcenous intent.

At trial, defense counsel vigorously pursued defendants' chosen defense, both attacking the witnesses' credibility and arguing that the circumstances of the encounter were not as represented by Hnilica. All three defendants presented a united front concerning the alleged initiation of the assault by Victor, and the attempts by Gutierrez and Michael to pull Hnilica from

the crashed car to render aid and stop the assault. Defendants also agreed on the alleged mistake that led to Gutierrez's decision to take Hnilica's jacket, which held Hnilica's packages of marijuana. The defense testimony did not establish any "differing degrees of culpability" regarding the charged offenses. Rather, there was complete agreement concerning the lack of culpability of all defendants. It is apparent that defendants engaged in a purposeful, unified defense and have not established an actual conflict of interest that adversely affected trial counsel's performance. Accordingly, reversal is not warranted.

III. SUFFICIENCY OF THE EVIDENCE

Gutierrez and Michael also challenge the sufficiency of the evidence supporting their convictions for unarmed robbery. We review de novo a challenge to the sufficiency of the evidence. *People v Cline*, 276 Mich App 634, 642; 741 NW2d 563 (2007). In doing so, we "view the evidence in [the] light most favorable to the prosecution and determine whether any rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt." *Id.* (quotation marks and citation omitted). Circumstantial evidence and reasonable inferences drawn therefrom are sufficient to prove the elements of a crime. *People v Nowack*, 462 Mich 392, 400; 614 NW2d 78 (2000). Further, we must "draw all reasonable inferences and make credibility choices in support of the jury verdict." *Id.*

MCL 750.530 proscribes unarmed robbery as follows:

> (1) A person who, in the course of committing a larceny of any money or other property that may be the subject of larceny, uses force or violence against any person who is present, or who assaults or puts the person in fear, is guilty of a felony punishable by imprisonment for not more than 15 years.
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> (2) As used in this section, "in the course of committing a larceny" includes acts that occur in an attempt to commit the larceny, or during commission of the larceny, or in flight or attempted flight after the commission of the larceny, or in an attempt to retain possession of the property.

Record evidence supported the jury's conclusion that Gutierrez and Michael both participated in the assault and robbery, even if they did not instigate the initial attack. Hnilica and Veldman testified that Gutierrez first approached Hnilica's car before Victor entered the vehicle, and that Gutierrez and Michael both participated in the assault after Victor instigated the attack. Gutierrez admitted taking Hnilica's coat, although he claimed that he did so by mistake. The evidence permitted the jury to infer that the assault was part of a common plan to rob Hnilica of his marijuana. See *People v McRunels*, 237 Mich App 168, 181; 603 NW2d 95 (1999) ("Because of the difficulty of proving an actor's state of mind, minimal circumstantial evidence of intent is sufficient."). Gutierrez's claim of mistake was presented to the jury, which was free to believe or reject his testimony.

Gutierrez and Michael also argue that the elements of robbery were not established because the assault was complete before any taking occurred. However, MCL 750.530(2), as amended in 2004, defines robbery as a transactional offense. The robbery offense continued during the attack and as defendants fled the scene in their vehicle. See *People v Williams*, 491

Mich 164, 170-171; 814 NW2d 270 (2012). The theft and assault occurred during the same continuous transaction, supporting defendants' conviction under MCL 750.530.

IV. INEFFECTIVE ASSISTANCE OF COUNSEL

Gutierrez and Victor raise additional claims of ineffective assistance of counsel. These challenges are also preserved as they were raised in defendants' motions for new trial below. The trial court failed to conduct a *Ginther*[1] hearing, however, and our review is necessarily limited to mistakes apparent on the record. *People v Gioglio (After Remand)*, 296 Mich App 12, 20; 815 NW2d 589 (2012), vacated in part on other grounds 493 Mich 864 (2012).

A. IMPEACHMENT EVIDENCE

Defendants first maintain that defense counsel should have more fully explored eyewitness Veldman's alleged mental health and drug abuse issues. Decisions regarding how to cross-examine and impeach witnesses are matters of trial strategy. *People v Davis*, 250 Mich App 357, 368; 649 NW2d 94 (2002). In this regard, Victor asserts that Veldman's daughter and her boyfriend would have been willing to testify regarding these issues. Victor failed to present an affidavit or other offer of proof in this Court or the lower court, showing the factual basis of any testimony these witnesses could have provided. Neither defendant makes any attempt to explain whether such evidence even would have been admissible. Defendants' failure to adequately establish the factual predicate for their claims precludes relief. *People v Hoag*, 460 Mich 1, 6; 594 NW2d 57 (1999).

Defendants also contend that counsel should have questioned Hnilica about his mixed martial arts training. The record reveals that defense counsel actually attempted to raise this line of questioning but was rebuffed by the court. Defendants have not challenged the court's evidentiary ruling in this regard. As defense counsel attempted to introduce this testimony, however, he cannot be deemed ineffective in this respect.

Defendants claim that defense counsel was ineffective in failing to present evidence that Hnilica had cocaine and marijuana derivatives in his system at the time of the attack. The prosecutor sought to preclude admission of this evidence prior to trial. The parties and the court discussed this issue on the record and determined that the evidence was irrelevant. As there is no record indication that Hnilica was intoxicated by the substances at the time of the attack, we cannot fault defense counsel's concession that the evidence was irrelevant.

Defendants assert that counsel should have cross-examined Hnilica concerning his "prior assaultive acts." Defendants cite Hnilica's prior conviction in Florida for aggravated battery. Defendants acknowledge that this previous conviction would not be admissible under MRE 609 (impeachment by prior conviction), but contend that defense counsel should have sought its admission under MRE 404(b) (other acts). However, neither presents any support for their contention that this evidence was admissible for a proper purpose under MRE 404(b).

[1] *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973).

Accordingly, defendants have failed to satisfy their burden of showing that defense counsel was ineffective for failing to seek admission of the testimony under that rule.

B. LESSER OFFENSE INSTRUCTIONS

Defendants contend that defense counsel should have requested instructions for offenses inferior to assault with intent to commit great bodily harm less than murder, such as aggravated assault and assault and battery, and offenses inferior to unarmed robbery, such as larceny from the person and simple larceny. Contrary to defendants' challenge, counsel did request such instructions, which were denied by the trial court because they were either not necessarily included lesser offenses or were not supported by a rational view of the evidence. See *People v Cornell*, 466 Mich 335, 357; 646 NW2d 127 (2002) (permitting instructions on lesser offenses only if the requested lesser offense is necessarily included within the charged, greater offense and the requested offense is supported by a rational view of the evidence). Thus, there is no merit to this claim.

C. EXPERT WITNESS TESTIMONY

Defendants lastly challenge defense counsel's decision to allow testimony regarding blood spatter evidence from the prosecutor's expert witness, forensic scientist Jodi Corsi, without requesting a *Daubert*[2] hearing or otherwise objecting to her testimony. Defendants complain that Corsi did not testify regarding "her methodology's known rate of error" or cite any studies or peer review in support of her theories.

A trial court considering whether to admit expert testimony under MRE 702 acts as a gatekeeper and its principal duty is to ensure that all expert testimony is reliable. *Gilbert v DaimlerChrysler Corp*, 470 Mich 749, 782; 685 NW2d 391 (2004). MRE 702 requires

> a court evaluating proposed expert testimony [to] ensure that the testimony (1) will assist the trier of fact to understand a fact in issue, (2) is provided by an expert qualified in the relevant field of knowledge, and (3) is based on reliable data, principles, and methodologies that are applied reliably to the facts of the case. [*People v Kowalski*, 492 Mich 106, 120; 821 NW2d 14 (2012).]

Indicia of reliability relevant to scientific fields can include testability, publication and peer review, known or potential rate of error, and general acceptance in the field. *Daubert*, 509 US at 593-594.

At trial, Corsi provided "blood pattern analysis" of the various articles of clothing worn by defendants at the time of their arrests. Corsi described the differences between "saturation" bloodstains from absorption of blood into clothing and "transfer" bloodstains where a nonbloody surface comes into contact with a bloody surface. She also explained "impact" stains, which indicate that force was applied to a bleeding surface, such as when someone is hit with a baseball

[2] *Daubert v Merrell Dow Pharms, Inc*, 509 US 579; 113 S Ct 2786; 125 L Ed 2d 469 (1993).

bat, and because of the force, blood "spatters" onto the surface of the impacting object. Corsi testified that there were impact, transfer, and saturation bloodstains on the legs of Gutierrez's jeans and long-sleeved shirt, which indicated that at some point he was within one or two feet of a forceful impact on the source of the blood, i.e., Hnilica. When asked whether these stains were consistent with defendants' story of Gutierrez assisting a person out of a car in order to render aid, she stated that they were not. On cross-examination, however, Corsi conceded that Gutierrez's clothes possibly could have been stained while trying to pull apart a pair of active combatants during a fight.

Defendants have not supported their claim that such blood-spatter evidenced would be deemed unreliable under MRE 702. Although counsel could have requested a *Daubert* hearing, counsel appears to have had an objectively reasonable strategy of seeking to have the expert admit that the bloodstains could have resulted from activity consistent with defendants' version of events. Under the circumstances, this choice of strategy was not objectively unreasonable. That this strategy did not work does not render its use ineffective assistance of counsel. *People v Petri*, 279 Mich App 407, 412; 760 NW2d 882 (2008).

V. SENTENCING ISSUES

A. SCORING OF THE SENTENCING GUIDELINES

All three defendants challenge the trial court's scoring of several offense variables (OVs).[3] When reviewing a trial court's scoring decision, the court's factual determinations are reviewed for clear error and must be supported by a preponderance of the evidence. *People v Hardy*, 494 Mich 430, 438; 835 NW2d 340 (2013). "Clear error exists when the reviewing court is left with a definite and firm conviction that a mistake was made." *People v McDade*, 301 Mich App 343, 356; 836 NW2d 266 (2013). "Whether the facts, as found, are adequate to satisfy the scoring conditions prescribed by statute, i.e., the application of the facts to the law, is a question of statutory interpretation, which an appellate court reviews de novo." *Hardy*, 494 Mich at 438.

Defendants all challenge the trial court's assessment of 50 points for OV 7. MCL 777.37(1)(a) provides that 50 points are to be scored when "[a] victim was treated with sadism, torture, or excessive brutality or conduct designed to substantially increase the fear and anxiety a victim suffered during the offense." The trial court scored 50 points based on its determination that defendants treated Hnilica with excessive brutality. Contrary to defendants' argument, the court was not required to also find that the conduct was intended for defendants' gratification.

[3] Gutierrez also challenges the accuracy of the prior convictions used to score of prior record variable (PRV) 5. At sentencing, however, he only challenged the accuracy of one prior conviction. After concluding that the prior conviction would not affect the scoring of the guidelines, the trial court struck that conviction. Defense counsel specifically stated that this was the only item being challenged. Defense counsel's statement that he was not challenging the remaining convictions waived any other claim of error related to the scoring of PRV 5. *People v Carter*, 462 Mich 206, 215; 612 NW2d 144 (2000).

That is necessary only for a showing of sadism, which is an independent basis for scoring OV 7. See MCL 777.37(3) (defining "sadism" as "conduct that subjects a victim to extreme or prolonged pain or humiliation and is inflicted to produce suffering or for the offender's gratification"). Nor was plaintiff required to show that the conduct qualifying as "excessive brutality" was designed to increase the victim's fear and anxiety suffered during the offense. The two concepts are mutually independent justifications for scoring 50 points for OV 7. *Hardy*, 494 Mich at 441. A preponderance of the evidence supports a finding that defendants treated Hnilica with excessive brutality. Defendants ganged up and savagely beat Hnilica for a prolonged period, causing serious injuries to Hnilica's head and face. The trial court did not err in scoring 50 points for OV 7.

The court also did not err in scoring five points for OV 10 (exploitation of a vulnerable victim) in relation to all three defendants. MCL 777.40(1)(c) provides for a five-point score when the defendant "exploited a victim by his or her difference in size or strength, or both, or exploited a victim who was intoxicated, under the influence of drugs, asleep, or unconscious." "Exploit" is defined under the statute as the manipulation of a victim "for selfish or unethical purposes." MCL 777.40(3)(b). "Vulnerability" is defined as "the readily apparent susceptibility of a victim to injury, physical restraint, persuasion, or temptation." MCL 777.40(3)(c). "Manipulate" is not defined in the statute. Its general definition, however, is "to manage or influence skillfully and often unfairly;" "to handle or use, esp. with skill;" "to adapt or change . . . to suit one's purpose or advantage;" or "to examine or treat by skillful use of the hands." *Random House Webster's College Dictionary* (1997), p 799.

Defendants outnumbered their victim three to one. During the evening, they befriended Hnilica, lulling him into a sense of comfort. They waited until Hnilica was outside the bar, in the dark and alone in his car, to strike. In this way, defendants manipulated Hnilica for their selfish, unethical purposes. Moreover, Hnilica was vulnerable because he was alone and defendants were larger in number and strength. And by waiting until they had Hnilica in a less safe and visible location, defendants rendered him more vulnerable to their attack. The court therefore did not err in scoring OV 10. In fact, the court could have assigned 15 points for this variable, representing that defendants engaged in "predatory conduct" in preparing Hnilica for victimization. See MCL 777.40(1)(a), (3)(a); see also *People v Huston*, 489 Mich 451, 466-468; 802 NW2d 261 (2011).

Victor's challenge to the court's 10-point score for OV 14, reflecting his leadership in a multiple offender situation, is also without merit. See MCL 777.44(1)(a). Victor alleges that this score was improper in relation to his robbery conviction because he claims ignorance that Gutierrez took Hnilica's jacket (and the marijuana inside) at the time of the offense. The evidence supports an inference, however, that Victor instigated the assault so defendants could steal the marijuana. This score was therefore supportable.

Yet, the court did err in scoring several other offense variables. The court improperly scored OV 1 at 10 points and OV 2 at one point in relation to all three defendants. MCL 777.31(1)(d) provides for a 10-point score for "aggravated use of a weapon" when "[t]he victim was touched by any other type of weapon." MCL 777.32(1)(e) (lethal potential of the weapon possessed or used) requires a score of one point when a defendant "possessed or used any other potentially lethal weapon." These subsections refer to items not generally deemed weapons that

are used as such. *People v Lange*, 251 Mich App 247, 255; 650 NW2d 691 (2002). Defendants' scores were based on the use of their shoes as weapons while kicking Hnilica during the assault. Both this Court and our Supreme Court has held that otherwise benign items can be counted as weapons under OV 1 and OV 2 if the items are used as weapons. See *People v McCuller*, 479 Mich 672, 696-697; 739 NW2d 563 (2007) (baseball bat); *People v Goolsby*, 284 Mich 375, 378-379; 279 NW 867 (1938) (car); *Lange*, 251 Mich App at 252-258 (glass mug). Although not binding precedent, this Court has also issued a plethora of unpublished opinions naming as lethal weapons in certain contexts a flashlight, the prongs of a metal snap removed from a prison jumpsuit, a sonic inspect-repelling device, and a belt. Had defendants in this case been wearing heavy boots or high heels and used their footwear for the purpose of causing injury to their victim, scoring OV 1 and OV 2 would make sense in the current case. Defendants were wearing only sneakers, however, a soft shoe that could inflict little more injury than a bare foot. And there is no record indication that defendants used their shoes as an instrument of attack rather than as a simple foot covering. Compare *Lange*, 251 Mich App at 257 (in which a glass mug was used as a weapon in furtherance of a fight). Accordingly, these variables were scored in error.

The court also erred in scoring 10 points for OV 19. MCL 777.49(c) provides for a 10-point score when the defendant "otherwise interfered with or attempted to interfere with the administration of justice." This score stands in contrast to subsection (a), which requires a 25-point score when the defendant threatens the security of a penal institution or court, and (b), which requires a 15-point score when the defendant uses force or a threat of force to interfere with the administration of justice or provision of emergency services. Defendants' score is based on their failure to immediately stop their vehicle when tracked down by police. The officers activated their lights for only 30 to 45 seconds before escalating to the use of their sirens. Thereafter, defendants proceeded at "a very low rate of speed" for approximately 300 feet before stopping. Defendants did not attempt to flee the scene. There is no record indication that defendants' slow reaction time was purposeful. In fact, they stopped rather quickly and in a safe and slow manner. There simply is no evidence that defendants were attempting to interfere with the administration of justice. Accordingly, the court erred in scoring this variable.

The error in scoring certain OVs, standing alone, does not entitle defendants to resentencing in this case. Defendants all had extremely high total OV scores. Gutierrez and Michael had OV scores of 111, and Victor of 121. Even if OVs 1, 2, and 19 were scored at zero points, this would only reduce defendant's OV scores by 21 points. All three defendants would still be left with total scores in excess of 75 points, the amount necessary for placement in OV Level VI, the highest level of offense severity. Because the scoring errors did not affect the appropriate guidelines range, defendants are not entitled to resentencing. *People v Sims*, 489 Mich 970, 970; 798 NW2d 796 (2011), mod on other grounds 490 Mich 857 (2011); *People v Francisco*, 474 Mich 82, 90 n 8; 711 NW2d 44 (2006).

B. JUDICIAL FACT-FINDING

All three defendants also argue that the trial court improperly engaged in judicial fact-finding in its scoring of the sentencing guidelines, contrary to the rule announced in *Alleyne v United States*, 570 US ___; 133 S Ct 2151, 2155; 186 L Ed 2d 314 (2013). In that case, the Supreme Court held that any fact that increases a mandatory minimum sentence is an "element"

of the crime that must be submitted to the jury. However, as this Court recently held in *People v Herron*, 303 Mich App 392, 403; 845 NW2d 533 (2013), *Alleyne* does not implicate Michigan's sentencing scheme because "judicial fact-finding within the context of Michigan's sentencing guidelines [is] not used to establish the mandatory minimum floor of a sentencing range." Accordingly, we reject this claim of error.

C. DEPARTURE FROM THE SENTENCING GUIDELINES RANGE

Victor argues that the trial court erred by imposing upwardly departing sentences for his unarmed robbery and assault convictions. Victor's 20-point PRV score placed him in PRV Level C and his high OV score placed him in the top OV level—VI. Under the sentencing guidelines, this resulted in a minimum sentencing range of 43 to 86 months for the robbery conviction, a Class C offense, and 29 to 57 months for the assault conviction, a Class D offense. The trial court departed from these ranges and sentenced Victor to concurrent prison terms of 100 to 180 months for the unarmed robbery conviction, and 80 to 120 months for the assault conviction, representing departures of 14 and 23 months from the high end of the guidelines ranges.

> Under MCL 769.34(3), a minimum sentence that departs from the sentencing guidelines recommendation requires a substantial and compelling reason articulated on the record. In interpreting this statutory requirement, the Court has concluded that the reasons relied on must be objective and verifiable. They must be of considerable worth in determining the length of the sentence and should keenly or irresistibly grab the court's attention. Substantial and compelling reasons for departure exist only in exceptional cases. "In determining whether a sufficient basis exists to justify a departure, the principle of proportionality . . . defines the standard against which the allegedly substantial and compelling reasons in support of departure are to be assessed." For a departure to be justified, the minimum sentence imposed must be proportionate to the defendant's conduct and prior criminal history. [*People v Smith*, 482 Mich 292, 299-300; 754 NW2d 284 (2008) (citations omitted)].

A sentencing court may not base its decision to depart on a characteristic already taken into account by the guidelines unless the court determines that the characteristic has been given inadequate or disproportionate weight. MCL 769.34(3)(b); *Smith*, 482 Mich at 300.

In reviewing a departure from the guidelines range, the existence of a particular factor supporting a departure is a factual determination subject to review for clear error. *People v Anderson*, 298 Mich App 178, 184; 825 NW2d 678 (2012). The determination that a factor is objective and verifiable is reviewed de novo as a matter of law. *Id*. The determination that a factor constituted a substantial and compelling reason for departure is reviewed for an abuse of discretion. *Id*. An abuse of discretion exists when the sentence imposed is not within the range of principled outcomes. *Id*. In addition, the degree of departure is also reviewed for an abuse of discretion. *Id*.; see also *Smith*, 482 Mich at 300.

In sentencing Victor, the court noted that his minimum guidelines range was lower than his codefendants because he did not have a prior felony record. The court acknowledged the

prosecutor's argument that Victor's leadership position in the current offense seemed incongruent with his lower penal culpability. The court declined to consider that fact, however, as it was already taken into account in scoring the guidelines. Instead, the court relied upon the 46-point gap between Victor's 121 OV score and the 75 points necessary to be placed in the top OV level on the grid:

> The offense variables in this case add up to 121. The guideline to the [sic] get to the top of the guidelines for offense variables only goes up to 75, so the guidelines range is calculated of [sic] C6 of 43 to 86 months does not adequately take into account the total number of points assessed under the offense variable. The guidelines, in a sense, don't go on forever, so they substantially under value the offense variables that have been scored in this case, so I believe that, that does constitute a substantial and compelling reason to depart from the guidelines in this case and give a sentence in excess of the guidelines.
>
> Any departure that I make has to be rooted in the guidelines and not just something that -- that I make up. If there were another grid, it would be the same as the -- the D6, which would be 50 to 100, and moving one grid over, extrapolating that to be a grid down, would give us a guideline range of 50 to 100, and I believe that, based upon the facts and circumstances of this case, given the fact that it was such a -- a vicious and unprovoked beating and the significant degree of injury involved, that a sentence -- a minimum sentence of up to 100 months would still be a proportionate -- proportional sentence, and would be appropriate for his defendant and -- and this offense.

The court's reasoning is sound and legally supported. Our Supreme Court has held that an OV score in excess of that needed to place a defendant in the highest category of offense severity may be used to justify a departure. *Smith*, 482 Mich at 308-309. As noted, however, the court erred in scoring certain offense variables, resulting in a 21-point reduction to his overall score. This corrected score would still be above the 75 points necessary to place Victor in the highest category of offense severity. However, we cannot be certain that the court would have departed to the extent chosen if those variables had been scored correctly. Accordingly, we must vacate Victor's sentences and remand for resentencing in light of the corrected offense variables. See *People v Babcock*, 469 Mich 247, 260-261; 666 NW2d 231 (2003).

We affirm defendants' convictions and the sentences imposed against Gutierrez and Michael. We vacate Victor's sentences and remand for resentencing consistent with this opinion. We do not retain jurisdiction.

/s/ E. Thomas Fitzgerald
/s/ Elizabeth L. Gleicher
/s/ Amy Ronayne Krause